Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	

COMMENTS OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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SUMMARY

The Cellular Telecommunications & Internet Association ("CTIA") strongly opposes the imposition of an "equal access" requirement on CMRS providers. In 1997, the Commission concluded that the imposition of equal access on CMRS providers would be contrary to the mandate of Section 332(c)(8) of the Act and the public interest. Since that determination was made, neither the statutory mandate of Section 332(c)(8) nor the public interest considerations underlying that decision have changed. Accordingly, the Commission should reaffirm its earlier rejection of equal access to the list of supported services.

In the *Recommended Decision*, those favoring the inclusion of equal access as a supported service stated that "no legal obstacle exists to the addition of equal access to the list of supported services." In reaching this conclusion, those parties claim that the Commission's ETC rules somehow trump the Congressional mandate contained in Section 332(c)(8) because CMRS carriers can "choose" whether or not they wish to receive USF support. This analysis ignores the plain language of Section 332(c)(8), which clearly states that CMRS providers "*shall not be required to provide equal access* to common carriers for the provision of telephone toll services." Accordingly, the Commission should swiftly reject this argument.

Furthermore, even assuming that Section 332(c)(8) did not exist, the imposition of an equal access requirement on CMRS providers with ETC status would still not be in the public interest. The vast majority of CMRS providers, including those with ETC status, offer "one rate" plans that include a "bundle" of

minutes that can be used for either local or long-distance calling. The Commission has found that these "one rate" plans serve the public interest. The imposition of an equal access requirement, however, would result in far more complex rate options, where consumers would receive bills from two carriers and would incur additional charges because their interexchange minutes would no longer come from wireless rate plan "buckets." Such a result can only increase the overall burden on both wireless ETCs and consumers, and will certainly not serve the public interest.

Finally, the imposition of equal access is inconsistent with prior Commission precedent and settled law and, if imposed, would open a Pandora's Box of new regulatory problems. In the past, the Commission has generally viewed CMRS as an integrated service offering. If equal access were imposed, it would reverse many of these Commission decisions and open a host of new regulatory issues. For example, under an equal access requirement, the Commission would need to re-examine the right of CMRS carriers to collect access charges from interexchange carriers. In addition, the Commission would also have to conduct a market-by-market review to define the appropriate geographic scope of a wireless "local service" provider. Such proceedings would cause regulatory uncertainty, and would only serve to harm the intense competition that exists in the current CMRS market. In 1997, the Commission made the right regulatory choice by refusing to impose an equal access requirement on CMRS providers. There is no reason to reverse that decision now.

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The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits the following comments pursuant to the Commission's February 25, 2003, Notice of Proposed Rulemaking[2] requesting comment on the *Recommended Decision* of the Federal-State Joint Board on Universal Service ("Joint Board") regarding the definition of services supported by universal service funds.[3]

CTIA strongly opposes the imposition of an "equal access" requirement on CMRS providers. In 1997, the Commission concluded that the imposition of equal access on CMRS providers would be "contrary to the mandate of section

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[2] *See Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking*, CC Docket No. 96-45, FCC 03-13 (rel. Feb. 25, 2003); *see also* Federal-State Joint Board on Universal Service, 68 Fed. Reg. 12,020 (2003) (setting April 14, 2003, deadline for initial comments).

[3] *See Federal-State Joint Board on Universal Service, Recommended Decision*, CC Docket No. 96-45, FCC 02J-1 (rel. July 10, 2002) (hereinafter "Recommended Decision").

332(c)(8)."[4] The Commission also found that such as requirement would "undercut local competition and reduce consumer choice and, thus, would undermine one of Congress's overriding goals in adopting the 1996 Act."[5] Since that determination was made, the statutory mandate of section 332(c)(8) has not changed. Furthermore, the imposition of equal access at the request of a few rural Incumbent LECs would only serve to stifle the continued entry of new CMRS providers and services into rural and insular areas.[6] This, in turn, would reduce competition and choice in the telecommunications market. Such a result was not intended by Congress, and would certainly not serve the overall public interest. As Commissioner Abernathy, the Chair of the Joint Board, noted in her Separate Statement, "we should not manipulate the definition of universal service as a backdoor means of responding to concerns about the manner in which competitive ETCs receive support."[7] Accordingly, the Commission should reaffirm its earlier rejection of equal access to the list of supported services.

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[4] *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8819 (1997) (hereinafter "First Report and Order").

[5] *Id*. at 8820.

[6] *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, 347 (1978)("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition").

[7] Recommended Decision at 37 (Separate Statement of Commissioner Kathleen Q. Abernathy).

I. SECTION 332(c)(8) PROHIBITS THE IMPOSITION OF EQUAL ACCESS ON CMRS PROVIDERS

In the *Recommended Decision*, those favoring the inclusion of equal access as a supported service stated that "no legal obstacle exists to the addition of equal access to the list of supported services."[8] In reaching this conclusion, those parties claim that the Commission's ETC rules somehow trump the Congressional mandate contained in Section 332(c)(8) because CMRS carriers can "choose" whether or not they wish to receive USF support.[9] This analysis ignores the plain language of Section 332(c)(8), and should be rejected by the Commission.

Section 332(c)(8) clearly states that providers of CMRS services "*shall not* be required to provide equal access to common carriers for the provision of telephone toll services."[10] The only possible exception to this requirement is where the Commission makes a determination "that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity," in which case the Commission can order unblocked access "through the use of a carrier identification code assigned to such provider or other mechanism."[11]

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[8] Recommended Decision at ¶ 75.

[9] *Id*. at ¶ 76 (stating that "if a carrier wishes to seek ETC status and receive universal service support, then all ETCs – including CMRS providers – should offer all of the supported services, including equal access").

[10] 47 U.S.C. § 332(c)(8).

[11] *Id.*

However, with regard to the "unblocked access" exception of Section 332(c)(8), the proponents of an equal access requirement made no showing in the *Recommended Decision* that CMRS subscribers are being denied access to competitively priced telecommunications services. In fact, proponents of the equal access requirement admit that "the wireless industry has experienced phenomenal growth since the passage of the Act, *which indicates consumer satisfaction*."[12] Based on this statement, and the complete absence of other data or other evidence of actual dissatisfaction with the seamless service offered by CMRS providers, it would appear that proponents of the equal access requirement are not even arguing that the "unblocked access" provision could be applicable in this case, let alone prove the actual proposition.

Therefore, the Commission must follow the mandate stated in the first sentence of Section 332(c)(8), which clearly states that CMRS providers "shall not be required to provide equal access."[13] As the Commission determined in 1997, this provision does not provide an exception for CMRS carriers that have been designated as ETCs, or for any other purpose.[14] In light of the fact that

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[12] Recommended Decision at ¶ 81.

[13] 47 U.S.C. § 332(c)(8).

[14] First Report and Order, 12 FCC Rcd at 8819.

> . . . [I]ncluding equal access to interexchange service among the services supported by universal service mechanisms would require a Commercial Mobile Radio Service (CMRS) provider to provide equal access in order to receive universal service support. We find that such an outcome would be contrary to the mandate of section 332(c)(8), which prohibits any requirement that CMRS providers offer "equal access to common carriers for the provision of toll services." *Id.*

neither the statute nor sound principles of statutory construction have changed since 1997, there is no reason to revisit this determination now.

II. THE IMPOSITION OF AN EQUAL ACCESS REQUIREMENT ON CMRS PROVIDERS IS NOT IN THE PUBLIC INTEREST

Even assuming, *arguendo*, that Section 332(c)(8) did not exist, the imposition of an equal access requirement on CMRS providers with ETC status would still not meet the USF supported service factors contained in Section 254(c). Under Section 254(c), the Commission can only add services to the list of supported services after determining that they: 1) are "essential to education, public health, or public safety;" 2) "have, through the operation of market choices by consumers, been subscribed to by a substantial majority of residential consumers;" 3) "are being deployed in public telecommunications networks by telecommunications carriers;" and 4) "are consistent with the public interest, convenience and necessity."[15] As detailed below, the imposition of equal access on ETC-designated CMRS providers does not meet any of the four factors.

First, equal access does not provide an actual functionality that is "essential to education, public health or public safety." Instead, equal access was intended to allow wireline customers to have a choice between various carriers for the provision of interexchange service, which is already a supported service. Accordingly, it is hard to see how the imposition of an equal access requirement

[15] 47 U.S.C. § 254(c).

on CMRS providers would further penetration of interexchange access or service, since interexchange service already is provided by CMRS providers.[16]

Second, equal access has not been "subscribed" to by a substantial majority of residential customers "*through the operation of market choices*" as the Act requires.[17] Equal access is not subscribed to through the operation of market forces. To the contrary, equal access was a remedy to an antitrust case imposed by the United States District Court for the District of Columbia as part of the Modified Final Judgment ("MFJ") that ordered the AT&T breakup.[18] The Commission subsequently expanded the obligation to other local exchange carriers who receive a request for equal access from an interexchange carrier.[19] As Commissioner Abernathy notes in this regard:

> to the extent that the deployment of equal access has been left to voluntary market choices — that is, in the wireless arena — it has neither been subscribed to by a substantial majority of consumers nor deployed by carriers. Moreover, applying the second criterion literally, the fact that consumers do not "subscribe" to equal access suggests that it is not the kind of service that Congress envisioned

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[16] Moreover, given that the Commission has established MTAs as the appropriate calling area for CMRS customers, most calls affecting the "education, public health, or public safety" will not be classified as interexchange traffic.

[17] 47 U.S.C. § 254 (c)(1)(B).

[18] *See United States v. American Tel. And Tel*., 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[19] As the Joint Board notes, there are rural carriers in remote locations that have never implemented equal access because they have never received a bona fide request for such access from a competing interexchange carrier. *See* Recommended Decision at ¶ 78, n.169. Not surprisingly, given the success of the CMRS "one rate" plans, none of the interexchange carriers that participated in this proceeding — the would-be beneficiaries of an equal access requirement — supported imposition of such a requirement.

> as part of the definition of universal service; indeed, equal access is not a "service" at all.[20]

Therefore, equal access cannot be considered a service that is widely "subscribed" to by American consumers.

Third, equal access is not a service that is currently being "deployed" by telecommunications carriers. As noted in Section 254(c)(1), the concept of universal service is meant to include "an evolving level of telecommunications services that the Commission shall establish periodically."[21] As noted above, however, equal access is not an "evolving" telecommunications service. Instead, it was judicially-imposed as an antitrust remedy more than twenty years ago to ensure that wireline customers would have a choice of interexchange carriers. Had Congress intended to include equal access as a requirement on carriers designated as ETCs, it had the opportunity to do so when it drafted Section 254 in the Telecommunications Act of 1996. To the contrary, in the same Act Congress amended Section 332(c) to include subpart (8) which clearly states that providers of CMRS services "*shall not* be required to provide equal access to common carriers for the provision of telephone toll services."[22]

Finally, the imposition of equal access requirements on CMRS providers will not serve the "public interest, convenience and necessity." In fact, the imposition of such a requirement will likely do the opposite. As noted below,

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[20] Recommended Decision at 40 (Separate Statement of Commissioner Kathleen Q. Abernathy).

[21] 47 U.S.C. § 254(c)(1).

[22] 47 U.S.C. § 332(c)(8).

imposing equal access on CMRS providers will lead to new regulatory uncertainty while providing no benefits to consumers.

The vast majority of CMRS providers, including those with ETC status, offer "one rate" plans that include a "bundle" of minutes that can be used for either local or long-distance calling. The Commission has found these "one rate" plans serve the public interest.[23] The ability of CMRS providers to offer "one rate" plans flows directly from Section 332(c)(8) which exempts CMRS carriers from equal access requirements. Indeed, it is the very success of the "one rate" plans that argues against the notion that equal access should be added to the definition of services supported by universal service funds.

Congress instructed the Joint Board and the Commission to base their Universal Service policies on the principle that

> [c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available to at rates that are reasonably comparable to rates charged for similar services in urban areas.[24]

Applying this principle, it is clear that a goal of the Universal Service program should be to make available to high cost rural customers the same "one rate" plans

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[23] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Seventh Report*, 17 FCC Rcd 12985, 13915 (2002) (hereinafter "Seventh Annual Report") (stating that the "continued rollout of differentiated pricing plans indicates a competitive marketplace").

[24] 47 U.S.C. § 254(b)(3).

that are so successful in urban markets.[25] However, the "bundle" of minutes that can be used for either local or interexchange calling that lies at the heart of these plans is completely inconsistent with equal access. What consumer would select a long distance carrier rate plan that includes a separate charge for interexchange calls – a charge that would be in addition to what the consumer must pay the CMRS carrier under a "one rate" plan for a minute of use.[26] It is no wonder that interexchange carriers have expressed no interest in extending the equal access requirement to CMRS carriers!

Given the inability of CMRS carriers to collect access charges from interexchange carriers, the "one rate" bundle is so compelling that there can be no

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[25] Indeed, the FCC has found that where CMRS carriers serve rural markets, customers in these markets receive the same services at the prices that are comparable (or even below) the prices available in urban markets. *See* Seventh Annual Report, 17 FCC Rcd at 13024 (noting that an October 2001 analysis of "mobile telephony pricing in rural versus urban markets" conducted by EconOne indicated that "there was virtually no difference in the average monthly charge for wireless service between the two groups").

[26] The Commission has declined to enforce CMRS carriers' right to assess access charges. *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges, Declaratory Ruling*, 17 FCC Rcd 13192, 13201 (2002). In an equal access environment, the Commission would have to provide wireless carriers with an enforceable right to collect access charges, or accept that CMRS carriers would need to charge their customers for access to interexchange carriers. Prior to the 1996 amendments to Section 332(c), wireless customers were charged twice for such access – first, by the CMRS carrier who had no FCC-established right to collect access charges from interexchange carriers, and then again by the interexchange carriers, who charged CMRS customers the same rates they charged their wireline customers. Unfortunately for CMRS customers, these interexchange carrier rates imputed the access charges assessed by Incumbent Local Exchange Carriers, forcing CMRS customers to pay the interexchange carrier for an access charge that the interexchange carrier never flowed through to the CMRS carrier.

competition for interexchange traffic.[27] Equal access would result in far more complex rate options, where consumers would receive bills from two carriers and incur additional changes because their interexchange minutes would no longer come from wireless rate plan "buckets."

Given all the reasons why the imposition of equal access on CMRS carriers makes no sense to consumers, the inescapable conclusion is that it is being advanced solely as a ploy to reduce competition – a result that goes against the entire concept Congress incorporated in Section 254, and is not in the public interest.[28] In many rural and insular areas, wireless providers offer the only competition to the incumbent LEC, and often spur the incumbent to upgrade service. The imposition of an equal access requirement, however, will increase the regulatory and economic burden on many wireless CETCs, and may cause many to either reduce service expansions or pull out of certain areas entirely. Such an anticompetitive result was certainly not intended under Section 254 of the Act, and would not serve the public interest.

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[27] This poses no competitive threat to consumers because there is so much CMRS competition. Even rural markets that don't have as many facilities-based CMRS providers as some urban markets receive the same competitive benefits through wireless carriers' national rate plans and the provisions of sections 201 and 202 of the Act. *See* Seventh Annual Report, 17 FCC Rcd at 13025 (noting that the advertising of highly competitive nationwide rate plans creates pressure on rural operators to also maintain highly competitive prices).

[28] See Bork, n. 6. *supra.*

III. THE IMPOSITION OF EQUAL ACCESS ON CMRS PROVIDERS WOULD BE INCONSISTENT WITH COMMISSION PRECEDENT AND SETTLED LAW

In addition to the specific legal and policy infirmities associated with the proposal to add equal access to the list of supported services, it is also important to note that the proposal fails to recognize that CMRS is a unified service. Accordingly, any attempt to add an equal access requirement and, in effect, split CMRS into separate components would be contrary to years of Commission precedent treating the provision of CMRS as a single, integrated service offering.

A. The Imposition of Equal Access on CMRS Carriers Will Undermine Commission's Integrated Service Approach to CMRS

In 1994, the Commission found that CMRS carriers' provision of interstate interexchange service was part of an integrated CMRS package when it ordered the de-tariffing of interstate services offered by CMRS carriers.[29] The rationale for the de-tariffing order would not have made sense if the Commission had considered interstate services provided by CMRS carriers as a separate offering because the provision of interstate services was still subject to tariffing requirements at that time.[30]

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[29] *Implementation of §§ 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1417 (1994) ("CMRS Detariffing Order") (noting that in enacting the applicable provisions of the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act"), "Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace")..

[30] Prior to passage of the 1993 Budget Act, the Commission did not have the authority to forbear from requiring common carriers, including CMRS carriers, to

The Commission also identified CMRS as a complete, end-to-end service offering in the Customer Proprietary Network Information ("CPNI") proceeding.[31] In this matter, the Commission divided telecommunications offerings into three categories – local, interexchange and CMRS – for the purpose of determining carriers' rights to use CPNI derived from the provision of one service in order to market another service to that same customer.[32] In doing so, the Commission recognized that CMRS does not fit into either the local or interexchange category, but actually encompasses a distinct product, where these services are integrated into one package.[33] This approach was fleshed out further

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file the tariffs required under section 203 of the Act. Under the 1993 Budget Act, however, the Commission was given authority to forbear from some aspects of Title II regulation for CMRS services. The Commission later exercised this authority in the *CMRS Detariffing Order*, which would not have been possible had CMRS services been classified under the traditional landline components of "local" and "exchange" services.

[31] *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998).

[32] *Id*. at 8081-85.

[33] *See id*. at 8091.

> We also reject US WEST's claims, in support of the two category approach, that Congress's failure to mention CMRS in the legislative history suggests that it did not view CMRS as a separate service offering, but rather than CMRS is more appropriately treated as a technology or functionality of both local and long distance telecommunications service. We do not find Congress' silence in connection with CMRS as dispositive, and *reject the notion that CMRS is not a separate service offering*.
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> *Id.* (emphasis added).

on Reconsideration, where the Commission furthered the definition of CMRS to also include "information services and CPE."[34]

B. The Imposition of Equal Access on CMRS Providers Will Lead to New Regulatory Uncertainty

Adding equal access to the list of supported services will not only undermine the treatment of CMRS as an integrated service, but will also open a Pandora's Box of new regulatory problems. As noted above, under a CMRS equal access requirement, the Commission would need to re-examine the right of CMRS carriers to collect access charges from interexchange carriers. Absent an access charge mechanism, equal access simply is not a viable policy. Moreover, equal access cannot be imposed without defining the geographic boundary beyond which a call becomes "interexchange" and thus subject to the equal access requirement. For the original Bell Operation Companies subject to the MFJ (and the other wireline carriers included in the Commission's subsequent orders extending equal access), "LATAs" were established by the AT&T Consent Decree to define the demarcation between "exchange" and "interexchange" service. Small LATAs preserve more traffic for interexchange competition, while large LATA's have the opposite effect. With respect to CMRS, the Commission has adopted the MTA's used to license broadband PCS as the appropriate boundary for CMRS "exchange" service.[35] MTA's are much larger than LATAs,

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[34] *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, 14433 (1999).

[35] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, ¶ 1036 (1996) (stating that the MTA would serve as the "most appropriate

and, at least under the standard applied by the U.S. District Court overseeing the MFJ, they would be deemed to be too large to preserve sufficient interexchange traffic.

Surely the Commission has no desire to create a new access charge regime for CMRS carriers just as it is seeking to phase it out for wireline carriers. Similarly, CTIA cannot believe the FCC would want to conduct a market by market review to define the appropriate geographic scope of a wireless "local service" provider. Yet these are precisely the steps the Commission would have to take to provide equal access in the CMRS context that was "equal" to equal access in the wireline context. In 1996, Congress recognized that equal access was inconsistent with the competitive wireless industry and eliminated the requirement for CMRS providers. Experience has demonstrated that Congress made the right policy choice -- there is absolutely no reason to reverse it now. Commissioner Abernathy said it best, "the arguments advanced in support of adding equal access are wrong on the law, wrong on the facts, and wrong on policy."[36]

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definition for [a] local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5)").

[36] Recommended Decision at 37 (Separate Statement of Commissioner Kathleen Q. Abernathy).

CONCLUSION

For the aforementioned reasons, CTIA urges the Commission to reaffirm its earlier rejection of equal access to the list of supported services.

Respectfully submitted,

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